In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1554

JAMES O. MING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this suit in the United States Court of Claims, challenging the termination of his employment as a GS-13 physicist with the Atlantic Undersea Test and Evaluation Center (AUTEC), a branch of the Naval Underwater Systems Center (NUSC). The complaint sought reinstatement, back pay, and punitive damages.

NUSC separated petitioner on June 16, 1972, under reduction in force (RIF) procedures governed by 5 C.F.R. Part 351. This action was affirmed by the Civil Service Commission's Board of Appeals and Review on petitioner's administrative appeal (Pet. App. A2-A8). The Court of Claims granted the government's motion for summary judgment and dismissed the petition, stating that "plaintiff has failed to state a claim upon which relief can be granted and * * * the administrative action is supported by substantial evidence and is not arbitrary, capricious or so grossly erroneous as to imply bad faith" (Pet. App. A1).

The decision of the Court of Claims is correct, and further review is not warranted.

1. Petitioner argues (Pet. 3, 12-18) that his position was not in fact abolished, that the functions were not transferred to a contractor, and that RIF procedures were therefore wrongfully applied. The evidence, however, supports the Civil Service Commission's finding that plaintiff's position was, in fact, abolished (Pet. App. A6). Petitioner contends that one of the functions of his position, that of monitoring outside contractors, was not in fact transferred (Pet. 16). But the monitoring of contractors was only one of several functions of petitioner's position (see Pet. App. A46-A48); the majority of petitioner's duties were transferred to an outside contractor.

2. Petitioner also argues (Pet. 3, 13, 19-22, 33) that the agency established a "competitive level" and a "competitive area" for him that were so narrow as to violate the RIF regulations and preclude him from exercising his retention and reemployment rights. In a reduction in force, employees compete for retention only within their competitive level and competitive area. 5 C.F.R. 351.201(a), 351.402(a), 351.403(a). The agency established petitioner's competitive level as "physicist" and his competitive area as West Palm Beach, Florida.

Petitioner asserts that his level should have included engineer and operations research analyst (Pet. 19). Although petitioner was deemed qualified for appointment as an operations research analyst and to other non-physicist positions (Pet. 23; Pet. App. A19), that does not mean that the agency could "readily" have assigned him "to any of the other positions without changing the terms of his appointment or unduly interrupting the work program"—the requirement under 5 C.F.R. 351.403(a). The agency and the Civil Service Commission found that petitioner did not meet that standard with regard to non-physicist positions (Pet. App. A7, A13, A20); his competitive level thus was not unduly narrow.

Petitioner also asserts that his competitive area should have included Andros Island, which is a 50-minute airplane flight from West Palm Beach (Pet. 22). Since Andros Island is not within the local commuting area of West Palm Beach (see 5 C.F.R. 351.402(b), 351.203(d)), the agency and the Civil Service Commission were correct in holding that petitioner's competitive area was not too narrow (Pet. App. A6, A10).

3. Petitioner further argues (Pet. 4, 24-27, 32-33) that he should have been reinstated or reemployed because the agency was advertising positions in areas for which he had qualified for employment and because another employee, subject to the same RIF but with a lower retention ranking, had been re-employed at Cape Kennedy. Since Cape Kennedy is outside petitioner's competitive area, the Civil Service Commission correctly held that appointments there were irrelevant to petitioner's RIF rights under 5 C.F.R. Part 351.[1] The unfilled vacancies within petitioner's competitive area also do not violate petitioner's RIF rights, since the RIF regulation does not require an agency to fill a vacant position. 5 C.F.R. 351.201(b).

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[1]Petitioner asserts (Pet. 26) that 5 C.F.R. Part 330, Subpart B, provides to the contrary. That part, however, provides for priorities in appointments from the reemployment priority list established and maintained for the commuting area in which employees were separated by the reduction in force (in this case, West Palm Beach). See 5 C.F.R. 351.1001(a) and FPM Ch. 351, Subchapter 10, p. 351-39. Part 330 does not provide petitioner with rights outside his commuting area.

Petitioner's allegation that the employee hired at Cape Kennedy was subsequently transferred to West Palm Beach (Pet. 27; Pet. App. A67), never raised administratively, likewise does not indicate a violation of petitioner's RIF rights, since the RIF regulations do not prevent an agency from filling a vacant position by reassignment (FPM Ch. 330, Subchapter 2, p. 330-7), and since the reassignment apparently occurred more than two years after petitioner's separation. See 5 C.F.R. 351.1001(a).

4. Petitioner also alleges that he was deliberately deceived into believing that his job at West Palm Beach would be secure (Pet. 3, 9-12, 32), that he was not provided with an administrative hearing (Pet. 4, 34, 35), and that contrary to his requests he was placed only on two employment registers in Alabama (Pet. 29, 33). These contentions were not addressed to the Civil Service Commission's Board of Appeals and Review and are not properly before this Court. See, *e.g.*, *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33, 37. They are, in any event, insubstantial.

Petitioner's claim of deliberate deception rests on his assertion that the study that ultimately led to the RIF was commenced prior to his alleged assurances of job security (Pet. 9). That a study of the mission, requirements, and personnel of AUTEC had been commenced does not mean that the agency was aware that there would be a reduction in force.

Petitioner claims that he was entitled to an administrative hearing, but he never requested such a hearing at the administrative level. Although employees subject to an "adverse action" are entitled to a hearing, a separation under a RIF action is not an adverse action as defined by statute or regulation. See 5 C.F.R. 752.103(b)(3); cf. *Fass* v. *Gray*, 197 F.2d 587, 592 (C.A. D.C.), certiorari denied, 344 U.S. 839.

Finally, petitioner's complaint that he was improperly placed only on employment registers in Civil Service offices in Huntsville and Mobile, Alabama, is without merit; those were in fact the Civil Service offices with jurisdiction over the employment locations requested by petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.